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Nos. 440 and 441

In the Supreme Court of the United States

OCTOBER TERM, 1957

MORTON SOBELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the District Court[1] (A. 197–228)[2] is reported at 142 F. Supp. 515. The opinion of the Court of Appeals (Pet., No. 440, App. 2–12) is reported at 244 F. 2d 520.

[1] The District Court decided both of the two 28 U. S. C. 2255 motions herein involved in a single opinion. The Court of Appeals, similarly, disposed of both appeals in a single opinion and we respond to both petitions in this single brief in opposition.

[2] In conformance with the method adopted by petitioner, we shall designate with the letter "A." references to the current record on appeal, and with the letter "R." references to the printed record of the original trial (Nos. 111 and 112, O. T. 1952). The petitions for writs of certiorari will be referred to as "Pet., No. 440" and "Pet., No. 441," and the appendices to these petitions as "Pet., No. 440, App." and "Pet., No. 441, App."

JURISDICTION

The judgment of the Court of Appeals (Pet., No. 440, App. 1) was entered May 14, 1957. A petition for rehearing was denied on June 3, 1957. On August 28, 1957, Mr. Justice Harlan extended the time for filing petitions for writs of certiorari to and including September 10, 1957. The petitions were filed on September 9, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. The question presented in No. 440 is whether, on the basis of the allegations of petitioner's motion under 28 U. S. C. 2255, charging that his conviction of conspiracy to commit espionage was obtained through the knowing use of perjured testimony, he was entitled to a hearing for the introduction of testimony, or whether "the files and records of the case conclusively show" that he "is entitled to no relief."

2. The question presented in No. 441 is whether, on the basis of the allegations of another motion filed by petitioner under 28 U. S. C. 2255, charging that he was expelled from Mexico by the Mexican Secret Police at the instance and through the collusion of agents of the United States government, by means which were allegedly in violation of a treaty of extradition between the United States and Mexico, and by which means he allegedly came within the jurisdiction of the trial court, petitioner was entitled to a hearing to inquire into the truth of these charges with a view to determining whether the trial court had jurisdiction

to try him, or whether "the files and records of the case conclusively show" that he "is entitled to no relief."

STATUTE INVOLVED

Title 28, U. S. C., Section 2255 provides:

§ 2255. *Federal custody; remedies on motion attacking sentence.*

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the

judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

* * * * * *

STATEMENT

On March 29, 1951, petitioner and two co-defendants, Julius and Ethel Rosenberg, were found guilty by a jury verdict, returned in the United States District Court for the Southern District of New York, of conspiracy to commit espionage, in violation of former 50 U. S. C. 32 and 34 (now 18 U. S. C. 794) (R. 1579). On April 5, 1951, a motion in arrest of judgment, which raised for the first time the question of the court's jurisdiction over petitioner was denied. See *infra*, pp. 11–13. On April 5, 1951, petitioner was sentenced to thirty years' imprisonment (R. 30). His conviction was thereafter affirmed by the Court of Appeals for the Second Circuit in *United States* v. *Rosenberg*, 195 F. 2d 583, certiorari denied, 344 U. S. 838.

On May 8, 1956, pursuant to 28 U. S. C. 2255 (see pp. 3–4, *supra*), petitioner filed in the trial court, a mo-

tion (A. 8–40) to vacate and set aside his conviction and sentence, alleging that the prosecution had knowingly used perjured testimony at his trial, made false representations to the court, and suppressed evidence which would have impeached testimony given against him (A. 10). It is this motion which gave rise to the proceedings in No. 440.[3] On May 25, 1956, likewise pursuant to 28 U. S. C. 2255, petitioner filed, in the same court, a second motion[4] (A. 79–87) to vacate and set aside his conviction and sentence on the ground that the criminal proceedings against him had, allegedly, been instituted "in violation of the Constitution and laws of the United States, including *inter alia* the extradiction treaty between the United States and Mexico" (A. 80),[5] with the alleged consequence that the United States and its courts "thereby lacked all sovereignty and power" to conduct those proceedings (A. 81). It is this motion which gave rise to the proceedings in No. 441.

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[3] The charge of conscious use of perjurious testimony, relating to other matters, was also the subject of one of the two prior applications under Section 2255, in which petitioner joined, and which were found to be without merit. *United States v. Rosenberg*, 108 F. Supp. 798, 804 (S. D. N. Y.), affirmed, 200 F. 2d 666 (C. A. 2), certiorari denied, 345 U. S. 965. For a partial list of the judicial proceedings involving attempts to set aside petitioner's conviction, see A. 95–97; see also Memorandum for the United States in Opposition, No. 112, O. T. 1952, filed herewith, p. 2.

[4] This motion was, therefore, petitioner's fourth application under Section 2255, see fn. 3, *supra*.

[5] Petitioner referred in his petition to the "Treaty on Extradition signed on February 22, 1899, at Mexico City, 31 Stat. 1818" (A. 80).

Affidavits in opposition to these motions were filed by the Government (A. 41–64, 88–106), and reply affidavits were filed by petitioner (A. 65–77, 107–110). Thereafter, on June 20, 1956, following oral argument of both motions (A. 111–196), the District Court (Judge Irving R. Kaufman, who had presided at petitioner's trial) denied both motions (A. 197–228), setting forth in detail, in a "well reasoned and comprehensive opinion" (Pet. No. 440, App. 4), the reasons why, in the court's judgment, "[t]he motions and the files and records of this case show conclusively that the prisoner is entitled to no relief" (A. 226).

On May 14, 1957, the decision of the District Court was unanimously affirmed by the Court of Appeals for the Second Circuit (Pet., No. 440, App. 2–12).

Before considering the specific allegations of the two Section 2255 motions which gave rise to these proceedings, it will be necessary to set forth certain background facts.

1. THE NATURE OF THE EVIDENCE ADDUCED AGAINST PETITIONER AT THE TRIAL

The evidence against petitioner fell into two categories. First, Max Elitcher, a close friend of petitioner, testified that petitioner had taken an active part in the conspiracy and had attempted to get him to reveal secret information concerning the national defense (R. 197–263). This testimony was described by the trial judge, in his opinion denying the instant

motions, as "totally damning and convincing" (A. 214).*

The second category of evidence against petitioner was evidence tending to indicate an intent on his part to flee to Europe via Mexico, which was received as indicative of consciousness of guilt. Judge Kaufman, in his opinion denying the instant motions, summarized the major part of this evidence as follows (A. 214–216):

> * * * It had been brought out previously by David Greenglass that Julius Rosenberg, the head of the espionage ring, had urged him and his family to flee if the FBI started to close in, and had given Greenglass $4,000 to flee to Mexico and thence to Europe via Tampico (R.† 522–537). Subsequently, it was established that Sobell had gone to Mexico with his family in the Spring of 1950. He had gone openly and under his own name; however, it was shown without contradiction that while in Mexico Sobell traveled to both Tampico and Vera Cruz using aliases; that he had inquired as to how he might leave Mexico for Europe without proper papers; that while in Tampico and Vera Cruz he had enclosed letters to his wife in

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*Elitcher "was subjected to an intensive and exhaustive cross-examination," which "lasted two days and occupied 121 pages in the printed record" (A. 214; see R. 264–379, 388–394). The jurors were specifically instructed that if they did not believe Elitcher they were to acquit petitioner (R. 1566; A. 214).

†Judge Kaufman's "R." references, like ours, refer to the printed trial record.

Mexico City in unmarked envelopes sent to a neighbor; and that while in Mexico he had sent letters to his family in America, not directly, but enclosed in envelopes which listed false names as return addresses, and he had sent these envelopes to a friend requesting that he forward the letters. These facts were brought out by six disinterested witnesses, and the defense made no attempt to cross-examine them and even conceded the use of several of these different aliases.

William Danziger, an old friend of Sobell's, testified that he had received letters from an Mr Sowell and M. Levitov as the return addresses residing in Mexico; that he had opened them and found a note from Sobell requesting that he forward the enclosed letters to other members of the Sobell family. Sobell also requested Danziger to tell another relative that Sobell could be reached under the name of M. Sowell at a specified street address in Mexico. Danziger was not cross-examined (R. 857–867).

Thereafter, the government called to the stand Manuel Giner De Los Rios, a neighbor of the Sobells in Mexico City. De Los Rios testified that Sobell had approached him for information as to how a person could leave Mexico without papers, saying that he was afraid to return to the United States because he did not want to go back into the Army, having already experienced one war (R. 922). It was subsequently shown that Sobell had never been in the Army, having been continually deferred (R. 955). De Los Rios also testified that So-

bell had left his family and traveled to both Tampico and Vera Cruz. He knew this because during Sobell's absence, he had received two unmarked envelopes bearing postmarks from those two cities; inside each he found a letter beginning "Dear Helen" (the name of Sobell's wife), and he had turned both letters over to Mrs. Sobell. Again there was no cross-examination (R. 924–926).

Subsequently, Minerva Bravo Espinosa, a clerk in a Vera Cruz optical store, testified that Sobell had ordered a pair of glasses from her using the name M. Sand, and defense counsel conceded this fact (R. 927–930). Similarly, Jose Broccado Vendrell testified that Sobell had registered at his hotel in Vera Cruz as Morris Sand; again this fact was conceded and there was no cross-examination (R. 931–932). Dora Bautista, a hotel clerk in Tampico, testified that Sobell had registered in her hotel as Marvin Salt, and this too was conceded (R. 933–934). Glenn Dennis, an official of the Mexican Airlines, was called to testify, and via his testimony and defense concessions it was established that Sobell had flown from Vera Cruz to Tampico under the name of N. Sand, and from Tampico to Mexico City under the name of Morton Solt (R. 935–938).

"Not once during the trial," as Judge Kaufman notes, "did the defense attempt to explain the strange actions of this man and thus eradicate the impression of flight and guilty consciousness thus created. In summation defense counsel merely referred to these

actions as 'a brainstorm' which he said was none of anyone's business (R. 1503–1504)" (A. 216–217).*

2. THE ALLEGEDLY PERJURIOUS TESTIMONY

The testimony which petitioner claims to have been perjurious, and the perjurious character of which he says the Government knew when it adduced it (see *infra*, pp. 13–18), was that of James S. Huggins, an immigration inspector at Laredo, Texas, to whom petitioner was delivered on the occasion of his being forcibly ejected from Mexico by the Mexican Secret Police on the morning of August 18, 1950. The nature of Huggins' testimony and the circumstances under which it was given are summarized in the opinion below of Judge Kaufman as follows (A. 217):

> Immediately after these "flight" witnesses were called, the government attempted to introduce an immigration manifest card noting

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* Petitioner has personally admitted under oath his use of aliases in Mexico and the making of inquiries about passage to Europe and South America. In an affidavit dated September 23, 1953, filed with the Court of Appeals for the Second Circuit, in opposition to the Government's motion to affirm the denial by the District Court of a previous Section 2255 motion, petitioner stated (A. 49, 167):

> * * * I left the family in the Mexico City apartment and travelled around Mexico to Vera Cruz and Tampico, even using false names and inquiring about passage to Europe and South America for all of us.

His affidavit continued (A. 167):

> It is hard to understand how I might have been allowed to do such a stupid thing but it did not take long for me to recognize how inept and pointless it was. Of course I had no idea how it could be misinterpreted and how dangerous it would turn out to be. * * *

Sobell's return to the United States; the card was marked "deported from Mexico". The government attempted to introduce it as a record made in the ordinary course of business by the Immigration Service, but upon objection, the card was not allowed into evidence until the following day when James S. Huggins, the Immigration Inspector who had filled out the card, was flown to New York from Texas to authenticate it. He testified that the card was made out in the regular course of his duties, that he had obtained the information on it from Sobell himself when Sobell was brought to the border, except for the information regarding Sobell's "deportation". He explained that he had made the notation based on his *personal observation* that Sobell had been brought across the border by Mexican police. Despite repeated insistent questioning by defense counsel, he never suggested that he had made the entry because of any official information given him by the Mexican authorities or agents. He reiterated that the entry was based solely upon his observations at the time, and that he obtained Sobell's signature by telling him that all deportees must sign such cards (R. 1025–1037). [Emphasis in the original.]

3. THE MOTION IN ARREST OF JUDGMENT

Though both petitioner and his wife were well aware, before and during the trial, of the circumstances under which petitioner was allegedly taken from his Mexico City apartment by Mexican Secret Police and delivered at the border to immigration inspector Huggins and waiting agents of

the Federal Bureau of Investigation (A. 22–24; R. 31–33), neither he nor his wife nor his attorneys made any move, either before trial or during the trial, by motion, testimony, or even by cross-examination of the witness Huggins, to bring these alleged facts to the attention of the court (A. 219–223). Petitioner first brought these alleged facts to the court's attention in a motion and supporting affidavit in arrest of judgment (R. 31–33, 1587–1599), filed April 4, 1951 (R. 33), six days after the jury's verdict of guilty, and the day prior to the imposition of sentence.* The motion was denied (R. 1599), and the denial affirmed on appeal (*United States* v. *Rosenberg,* 195 F. 2d 583, 602–603 (C. A. 2), certiorari denied, 344 U. S. 838). Speaking for the Court of Appeals, Judge Frank, after pointing out that Rule 12 (b) (2) of the Federal Rules of Criminal Procedure requires that "[d]efenses and objections based on defects in the institution of the prosecution or in the indictment or information other than that it fails to show jurisdiction in the court or to charge an offense may be raised only by motion before trial" and that "[f]ailure to present any such defense or objection as herein provided constitutes a waiver thereof," and after noting that petitioner had made no such pre-trial motion despite the fact that "all the information con-

* At the hearing below, in reply to the court's query, "Why didn't the defense * * * raise the question of lack of personal jurisdiction if this was all true," counsel for petitioner replied that "that is something that would have to be asked of" petitioner's trial counsel (A. 134).

tained in the post-trial affidavit was known to him at that time" (195 F. 2d at 603), observed:

> He preferred to take his chances on the verdict, withholding his trump card until the trial was over. The Federal Rules of Criminal Procedure allow no such tactic. (*Ibid.*)

4. THE INSTANT MOTIONS

(*a*) *The motion charging the knowing use of perjured testimony.*—On May 8, 1956, as we have previously noted, petitioner filed a motion under 28 U. S. C. 2255 (the motion involved in No. 440) charging that his conviction was null and void on the grounds that, allegedly, the prosecution had knowingly used perjured testimony against him at his trial, suppressed evidence helpful to his defense, and made false representations to the court (A. 8–40).

Briefly summarized, the motion alleged as follows: That petitioner, his wife, and their two children, on June 22, 1950, departed from the United States "on a trip for Mexico" (A. 21, 23); that, prior to departure, they had obtained "tourist cards" in their own names from the Mexican Consulate (A. 21); that petitioner had purchased the airplane tickets in his own name, the manifest of the air flight bore his true name, and on his arrival in Mexico he rented living quarters in his true name (A. 21–22); that he "would have voluntarily returned to the United States, had it not been for his unlawful abduction on August 16, 1950" (A. 22); that on the latter date, while he and his family were having supper in their Mexico City apartment, "[t]hree Mexicans in civilian clothes, who iden-

tified themselves as officers of the Secret Police of the Federal District of Mexico," after knocking and being admitted to the apartment, seized him and accused him of robbing a bank in Acapulco (A. 22); that they "seized and refused to return the credentials he tendered to establish his identity" (A. 22); that he was physically assaulted (A. 22); that he "was taken to the offices of" the Federal District of Mexico, where he was kept under guard until early the following morning, August 17th (A. 22); that throughout this time "no legal proceedings were held, no hearing was conducted, nor was [he] presented with any charges or warrant of arrest or written authority for the action taken" (A. 23); that on August 17th he and the other members of his family were placed under guard in two automobiles, which proceeded northward (A. 23); that on August 18th, after a day of continuous driving, during which periodic stops were made, on which occasions one of the guards would make a telephone call, they arrived in Nuevo Laredo on the Mexico-Texas border (A. 23); that on the Mexican side of the border, an agent of the Federal Bureau of Investigation "entered the automobile" in which petitioner was riding "and instructed the driver to continue to the United States immigration office in Laredo, Texas" (A. 23); that this agent "stated he had been waiting for petitioner for many hours" (A. 23); that at the United States immigration office petitioner "was removed from the car by the FBI agent and taken before the witness Huggins [the immigration inspector who gave the allegedly perjurious testimony (see *supra*, pp. 10–11)] and was told to sign a card" (A. 23);

that he was then immediately placed in custody by another FBI agent [10] (A. 23–24); that his and his wife's baggage were examined and various objects removed (A. 24); that "[i]n petitioner's presence, one of the Mexican Secret Police turned over to the FBI the personal documents that had been unlawfully taken from him in Mexico City" (A. 24); that petitioner informed both the arresting FBI agent and Huggins "of his unlawful abduction by the Mexican secret police" (A. 24, 37); and that he was thereafter taken to the office of a United States Commissioner, where FBI agents showed petitioner personal effects which had been taken from his person and apartment in Mexico and "questioned him in respect thereto" (A. 24).

The motion further alleged that at the time of his arrival at the immigration office in Laredo "[h]is appearance clearly indicated that he had been physically assaulted" (A. 37); that the FBI agents and Huggins "were aware that the required [Mexican] deportation procedures had not been complied with" (A. 37); that within a day of petitioner's arrival "Huggins and other employees of the United States immigration office * * * were informed by Hector Rangel Obregon, chancellor of the Mexican consulate at Laredo, that petitioner had not been deported [*i. e.*, by the duly constituted Mexican immigration

[10] The motion alleged that "[p]etitioner was arrested without a warrant" (A. 24). However, a warrant for petitioner's arrest had been outstanding since August 3, 1950 (A. 92). The arresting officer need not have the warrant in his possession at the time of the arrest (Rule 4 (c) (3), F. R. Crim. P.).

authorities]" (A. 27); that Obregon "expressed concern and alarm that this matter had been handled without the knowledge or approval of the Mexican Government or its duly constituted authorities" (A. 27); that the prosecution "was fully informed of the circumstances of petitioner's seizure, from the abduction in Mexico to the time he arrived in Laredo" (A. 28); and that the FBI agent who arrested petitioner in Laredo (A. 23–24) "aided the prosecution in its pre-trial preparation" and "sat at the prosecution's table throughout the trial" (A. 28).

On the basis of these and other alleged facts set forth in the motion, the motion charged that, "The prosecution in the course of the trial introduced evidence to prove that petitioner was deported by the Government of Mexico. The testimony in support of this contention was perjurious; the documentary evidence tendered in support thereof was false."[11] This false evidence was essential to the prosecution's entire case against petitioner. The prosecution, knowing this evidence to be false and perjurious, willfully and intentionally used it to the prejudice of petitioner * * *" (A. 11).

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[11] The motion alleged that witness Huggins "testified that the information on the front portion of the record"—*i. e.*, the "immigration manifest card" (see *supra*, pp. 10–11)—"was furnished by petitioner, save for the notation 'Deported from Mexico.' This notation, according to the witness, was based on *information and observation* (R. 1027–1028)" (A. 13; emphasis added). However, as is clear from the very pages of the trial record which the motion cites—R. 1027–1028—Huggins testified that the notation in question was based on his own personal "observation" alone, and not on any "information" supplied him by anyone else.

On the matter of the pertinency of the allegedly false evidence, the motion averred that "[t]he evidence was used to represent falsely that petitioner would not have returned voluntarily to the United States" (A. 16); that in fact petitioner "would have voluntarily returned" "had it not been for his unlawful abduction" (A. 22); and that "[t]he prosecution used the false evidence of a deportation from Mexico to distort petitioner's innocent and lawful departure from the United States," "falsely pictur[ing] a desire to visit Mexico as a plan to avoid apprehension because of a consciousness of guilt" (A. 16–17).

The items of evidence helpful to his defense which petitioner charged had been suppressed by the Government (in addition to evidence tending to establish that petitioner had not been deported by the regularly constituted immigration authorities of the Government of Mexico) consisted of his "tourist card," evidencing his "lawful entry into Mexico" (A. 33), and his "vaccination certificate," which, it was asserted, "was obtained in preparation for his return to the United States" (A. 33)—these documents being among his personal effects which, according to the motion, were taken from petitioner at the time of his abduction and subsequent arrest (A. 33).

The allegedly false representations made to the court by the prosecuting attorney consisted of the latter's statements to the court, during oral argument on the motion in arrest of judgment (see *supra*, pp. 11–13), to the effect (1) that petitioner's affidavit in support of the motion in arrest "contains a falsehood in the statement that there was exhibited amongst other

things to the Mexican authorities visas. Counsel ought to know that his client never went into Mexico with a visa," and (2) that the same affidavit "portrays certainly that this defendant was not honorably escorted from Mexico, but that literally he was kicked out as a deportee" (A. 15). The motion charged that "[t]he representations that petitioner had entered Mexico without a visa (tourist card) and was subsequently deported by the Government of Mexico were both false * * *" (A. 15).

(*b*) ***The motion charging violation of the extradition treaty between the United States and Mexico.***—On May 25, 1956, petitioner filed the second Section 2255 motion herein involved (that presented in No. 441) (A. 79–87). It is similar to the first motion, adopting many of its allegations by reference, but bases the alleged invalidity of petitioner's conviction on the claim that the manner in which he was arrested constituted a violation of the 1899 Treaty of Extradition between the United States and Mexico (31 Stat. 1818) (A. 80, 84–86). By virtue of this alleged violation, the motion contends, "The United States itself, as well as its courts, thereby lacked all sovereignty and power to conduct the proceedings herein" (A. 81), with the alleged consequence that petitioner's conviction was null and void (A. 86).

ARGUMENT

The sole question presented by each of these petitions is whether the allegations made in the respective Section 2255 motions were such as to require a hearing for the taking of evidence on the issues raised, or

whether "the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief" (28 U. S. C. 2255, *supra*, pp. 3–4, par. 3.) Judge Kaufman, in denying these motions (after full argument as to the sufficiency of their allegations (A. 111–196)), was, of course, well aware of the function of a Section 2255 motion (A. 202) and acted on the assumption that the court, "[i]n passing on these motions," should "accept all of petitioner's averments as true insofar as they are not inconsistent with the record" (A. 203). We submit that the decision of the trial judge (with which the unanimous Court of Appeals agreed) that "[t]he motions and the files and records of this case show conclusively that the prisoner is entitled to no relief" (A. 228) is clearly correct, and that, accordingly, the petitions for writs of certiorari present no question requiring further review by this Court.

1. THE MOTION CHARGING THE KNOWING USE OF PERJURY (PETITION FOR CERTIORARI NO. 440) IS WITHOUT MERIT

(*a*) We submit that there was no "knowing use of perjury" because there was, in fact, no perjury. We believe that, for the reasons set forth by Judge Kaufman (at A. 217–219), it sufficiently appears from the trial record itself that "Huggins' testimony was not perjurious, nor was the [immigration] manifest false, as it could rise no higher than Huggins' explanation regarding the 'deportation' notation" (A. 219). As noted by the trial judge, "petitioner's contention that Huggins perjured himself when he testified that Sobell had been deported as he then well knew that Sobell's seizure had been contrary to Mexican deporta-

tion procedure" is "clearly refuted by the cold record which shows that time after time Huggins insisted that his notation was not based on official sources, but was based solely upon his own observations of Sobell's summary ejection. It is entirely clear that he was using the word 'deported' to mean expelled or ejected, and clearly even Sobell must have understood the notation to have that meaning as he himself signed the card when told that all deportees must do so" (A. 217–218)."

Moreover, as Judge Kaufman further remarks, it "should also be noted that in summation, Mr. Kuntz, Sobell's attorney, pointed out that Sobell had not been legally deported from Mexico; he argued that if Sobell had been deported the government would have shown it by other more competent evidence (R. 1505–1506). When Mr. Saypol, the prosecutor, summed up, he nowhere stated—or even inferred—that Sobell had been legally deported, but stated instead that 'the FBI caught up with him and brought him back and you have him here' (R. 1534). Patently, this does not show an attempt by the prosecution to create the impression of legal deportation as is now charged. Manifestly, it was the prosecution's intention to use Huggins' testimony to point up that Sobell's return to this country had been involuntary. Thus it was the natural capstone to the clear and convincing testimony regarding Sobell's attempt to

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[8] It is to be noted, furthermore, that on the reverse side of the manifest card, under "Remarks," there appears the notation "Brought to Immigration office by Mexican police" (R. 1031).

flee. Obviously, the defense attorneys also believed this was the sole purpose of introducing that evidence. They did not even attempt to bring the question of improper deportation procedures to the attention of the Judge out of presence of the jury—a device they had frequently employed throughout the trial—despite the fact that 24 hours elapsed between the time defense counsel saw the immigration manifest and the time that it was finally introduced into evidence via Huggins' testimony" (A. 218–219).

(*b*) Nor did the Government "suppress" any evidence favorable to petitioner, as charged.

As noted by the trial judge, "the prosecution cannot suppress evidence or facts if they are known to the defense, and if it is true that Sobell was abducted, this fact was clearly and admittedly within the possession of Sobell and his counsel before the trial. Indeed, his affidavit makes it clear that Sobell knew that this alleged illegal seizure was highly irregular. The petitioner now alleges that the defense was not in possession of sufficient facts showing that the FBI had instigated this procedure as is charged now—but this is hard to believe in light of Sobell's assertions in his first affidavit, submitted in support of his motion in arrest of judgment [see R. 31–33]—that an FBI agent was waiting for him on the Mexican side" (A. 219–220).[12]

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[12] See also A. 220–221, where the judge points out that it would have been perfectly possible for petitioner to adduce at his trial the facts surrounding his forcible abduction from Mexico (and thus refute any idea that he had been formally deported by Mexico) without taking the witness stand himself

Similarly, there is no basis for petitioner's contention that the two documents which were taken from him—his "tourist card" and "vaccination certificate" (see *supra*, p. 17)—were suppressed by the prosecution. In the first place, as Judge Kaufman notes, "Sobell knew of the evidence" and "knew who had it," yet "never sought its production, though he sought the production of numerous other documents" (A. 223–224). Furthermore, "the two items in question were not material to petitioner's case" (A. 224).[*]

(*c*) With respect to the alleged misrepresentations by the prosecuting attorney to the court (see *supra*, pp. 17–18), it is sufficient for present purposes to point out that both alleged misrepresentations, as observed by Judge Kaufman, "were made * * * after the verdict

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(*e. g.*, by putting his wife on the stand, by cross-examining Huggins, etc.); but that, in any event, even if to do so had required his taking the stand, this would not have entailed the deprivation of any constitutional right, since "The Constitution," while it "safeguards the right of a defendant to remain silent," "does not assure him that he may remain silent and still enjoy the advantages that might have resulted from testifying" (*Stein* v. *New York*, 346 U. S. 156, 177).

[*] The "tourist card," as Judge Kaufman explains, "could have established merely that Sobell went to Mexico under his own name; this was never denied or mentioned by the prosecution, and was specifically referred to by Mr. Kuntz [petitioner's attorney] in summation. Further, defendant's exhibits in this motion indicate that Sobell's attorneys had manifests of the airline on hand which clearly showed he traveled in his own name. They obviously decided, for trial strategy, not to introduce them" (A. 224). "As for the vaccination certificate, Sobell claims this shows he intended to return to the United States as it would be necessary for re-entry; he neglects to mention that this was an international certificate equally valid and equally necessary for entry into many foreign countries" (A. 224).

had been rendered, upon argument of the motion in arrest of judgment" (A. 224). They accordingly could not in any event have influenced the verdict."

2. THE MOTION CHARGING VIOLATION OF THE EXTRADITION TREATY BETWEEN THE UNITED STATES AND MEXICO (PETITION FOR CERTIORARI NO. 441) SIMILARLY LACKS MERIT

This motion charged, in substance, that petitioner's alleged forcible abduction from Mexico by officers of the Mexican Secret Police, at the instigation or through the collusion of agents of the FBI, constituted a violation of the Treaty of Extradition between the United States and Mexico (31 Stat. 1818), which, in turn, had the effect of totally depriving the trial court of jurisdiction to try him for the offense of which he was convicted (A. 80–86). This argument was likewise rejected after thorough consideration by the trial judge (A. 204–213) as well as by the court below (Pet., No. 440, App. 10–12).

(*a*) At the outset, we submit that petitioner has already fully litigated this issue. Immediately after his conviction, as we have seen, he moved, in a motion in arrest of judgment, to set aside the conviction on the ground that the court lacked jurisdiction because he had been illegally brought before it (R. 31–33, 1596),

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[11] See also A. 224–225, where Judge Kaufman points out that (and explains why) (1) the prosecuting attorney's comments "had no effect on post-trial proceedings" (A. 224) and (2) "were not false" in any event (A. 225). In view of the fact that the allegedly false representations were made to Judge Kaufman himself, it is evident that the latter's appraisal both of their over-all significance in the case and of their truthfulness should be conclusive.

which motion was denied (R. 1599). The Court of Appeals, on the original appeal from petitioner's conviction, likewise fully considered this contention and held that the issue raised was one of jurisdiction over petitioner's person, which had been waived by his failure to raise it until after trial. *United States* v. *Rosenberg*, 195 F. 2d 583, 602–03 (C. A. 2).[20] And in his petition for certiorari to review the affirmance of his conviction, which this Court denied at 344 U. S. 838, the question of jurisdiction was again pressed (see A. 104–106). Both in his brief in the Court of Appeals and in his petition for certiorari, petitioner relied upon *United States* v. *Rauscher*, 119 U. S. 407, and *Cook* v. *United States*, 288 U. S. 102, the same two cases upon which he relies now (Pet., No. 441, pp. 10–14). While petitioner, to be sure, has now modified his argument from one of lack of personal jurisdiction to "a total failure of all national and hence judicial power" (Pet., No. 441, p. 28), and from alleged violation of international law to alleged violation of the treaty of extradition between the United States and Mexico (Pet., No. 441, p. 7–14), the substance of his argument remains unchanged. As Judge Kaufman observed (A. 208):

> It is clear that petitioner's present argument

[20] Petitioner's brief to the Court of Appeals on the original appeal fully argued the issue (see A. 98–103) under the heading (A. 98):

> THE UNITED STATES, AND HENCE THE COURT BELOW, HAD NO JURISDICTION OF THE PERSON OF SOBELL, SINCE HE WAS FORCIBLY SEIZED IN ANOTHER COUNTRY BY OR AT THE INSTANCE OF THE F. B. I., AND THE COURT BELOW SHOULD HAVE DIRECTED A HEARING ON THIS ISSUE.

> re jurisdiction is but a twice-told tale in a new semantic guise. He seems to believe that by the mere device of changing attorneys and relabeling his claims, he may return to court time after time with the same basic argument.

Furthermore, since a court is required to raise the question of jurisdiction over the subject matter on its own motion (*Defiance Water Co.* v. *City of Defiance*, 191 U. S. 184; *United States* v. *Bradford*, 194 F. 2d 197 (C. A. 2), certiorari denied, 343 U. S. 979), the District Court and the Court of Appeals, having been presented with the allegation of abduction and the argument of lack of jurisdiction, necessarily considered the question of jurisdiction over the subject matter as well as personal jurisdiction. An issue must be considered litigated where the basic subject has been presented to three separate courts even though counsel later develops slightly different legal phraseology.

(*b*) Though petitioner now labels the issue arising from the alleged abduction as one of jurisdiction over the subject matter as distinguished from jurisdiction over his person, it is clear that the real issue, nevertheless, is personal jurisdiction—which, as has been noted, he waived by failure to raise it until after his trial.[17] For, labels apart, the only issue is whether he

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[17] It is well settled that jurisdictional objections, except as to jurisdiction over the subject matter, are waived by failure to present them in a timely manner. *Albrecht* v. *United States*, 273 U. S. 1, 8–9; *Pon* v. *United States*, 168 F. 2d 373 (C. A. 1). Indeed, petitioner's counsel expressly conceded at the hearing below that "if we were dealing with the matter of personal jurisdiction, we are out of court" (A. 132).

was properly before the trial court. Two of the very cases relied upon by petitioner (Pet., No. 441, pp. 26–28) make it clear that the irregular seizure of a person involves only the question of personal jurisdiction. *United States* v. *Rauscher, supra,* 119 U. S. at 433 ("jurisdiction of the person"); *United States* v. *Ferris,* 19 F. 2d 925, 926–927 (N. D. Cal.) ("jurisdiction over the person").[18] *Ford* v. *United States,* 273 U. S. 593, 606, settles the question:

> The issue whether the ship was seized within the prescribed limit did not affect the question of the defendant's guilt or innocence. *It only affected the right of the court to hold their persons for trial.* It was necessarily preliminary to that trial. The proper way of raising the issue of fact of the place of seizure was by a plea to the jurisdiction. A plea to the jurisdiction must precede the plea of not guilty. Such a plea was not filed. The effect of the failure to file it was to waive the question of the jurisdiction of the persons of defendants. [Emphasis added.][19]

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[18] Petitioner's reliance on *Cook* v. *United States, supra,* 288 U. S. 102 (Pet., No. 441, pp. 26–27) is also misplaced. There, proper objection was made before trial (288 U. S. at 108), and the Court merely stated that such an objection is not "lost by the entry of an answer to the merits" (*id.* at 122).

[19] Petitioner attempts to distinguish *Ford* by claiming that "[t]here was no such jurisdictional issue in *Ford*, because there was no extraterritorial action or seizure in violation of the treaty. The seizures in *Ford* were made strictly in accordance with treaty" (Pet., No. 441, p. 28). This Court, however, clearly stated in *Ford* that "[t]he main questions presented are, first, whether the seizure of the vessel was in accordance with the treaty * * *"

(*c*) Finally, even if petitioner had raised the instant issue of personal jurisdiction in time, and conceding *arguendo* all of the facts alleged by petitioner in his motion, those facts would not have constituted a sufficient basis to oust the trial court of jurisdiction to try him. Petitioner admits that he was apprehended by officers of the Secret Police of the Federal District of Mexico and that he was taken to the offices of the *Direccion Federal de Seguridad* of the Federal District of Mexico (A. 22).[20] His wife and children were also seized by Mexican police officers and taken to their offices (A. 23). On the following day, according to the motion, petitioner and his wife and children were driven north in separate automobiles toward the United States, still in the custody of Mexican police officers (A. 23). Not until he reached the border was petitioner turned over to agents of the FBI (A. 23–24).

Since the authorities agree that there is no right of asylum in a foreign country even where there is an extradition treaty (*e. g., Ker* v. *Illinois,* 119 U. S. 436, 442), Mexico had the unquestioned right to reconduct petitioner from its territory with or without cause or procedural protection. See Article 33 of the Mexican Constitution, Pet., No. 440, App. 20–21; 1 Oppenheim, *International Law* (8th ed. Lauterpacht,

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(273 U. S. at 600). The statement quoted in the text, *supra,* was made on the assumption that the seizure had been illegal (*id.* at 605).

[20] The latter fact indicates that the reconduction of the petitioner to the border was participated in or approved by Mexican officials of considerable standing.

1955), § 326; Wheaton, *International Law* (6th ed. Keith, 1929), p. 210. While petitioner claims that his seizure and reconduction were the result of a plan organized and supervised by agents of the FBI (Pet., No. 441, p. 7), the substantial participation of Mexican officials is enough to bring the case within the above principle. Preuss, *Kidnapping of Fugitives From Justice on Foreign Territory*, 29 Am. J. of Inter. Law 502, 507. In the *Savarkar* case, reported in Scott, *Hague Court Reports* (1916), p. 275, the Permanent Court of Arbitration held that neither an extradition treaty nor international law obligated Britain to return to France a British fugitive who had escaped to France and been restored to a British ship through the cooperation of subordinate French and British police. The Permanent Court held that such cooperation by the French police, without immediate disavowal by their superiors, constituted legitimate reconduction. There thus exist no grounds for considering the forcible removal of petitioner from Mexico as in violation of either the extradition treaty or international law.

Moreover, even if petitioner was removed from Mexico in violation of the extradition treaty, it is well settled that, except for the totally different circumstances presented by the *Rauscher* case, discussed *infra* at pp. 30–31, jurisdiction over the person of a defendant in a criminal case is not impaired by the manner in which he is brought before the court. See Note, 165 A. L. R. 947. The federal courts have thus consistently held that only the government whose

sovereignty has been violated, not the defendant,[21] may validly protest a seizure illegal under either international law or extradition treaties. *E. g., Ker* v. *Illinois, supra,* 119 U. S. at 443, 444;[22] *Chandler* v. *United States,* 171 F. 2d 921 (C. A. 1), certiorari denied, 336 U. S. 918; *United States* v. *Unverzagt,* 299 Fed. 1015 (W. D. Wash.), affirmed, 5 F. 2d 492 (C. A. 9), certiorari denied, 269 U. S. 566; *United States* v. *Insull,* 8 F. Supp. 310 (N. D. Ill.).[23] In

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[21] The only remedy of the defendant is to sue his abductors for trespass and false imprisonment. *Ker* v. *Illinois, supra,* 119 U. S. at 444.

[22] Petitioner's attempts to distinguish the *Ker* case (Pet., No. 441, pp. 20–22) are competely lacking in substance. (1) While *Ker* involved a state prosecution, treaties govern state and federal courts equally and subsequent federal cases have refused to make any distinction between cases arising in state and federal courts. *E. g., United States* v. *Toombs,* 67 F. 2d 744 (C. A. 5); *United States* v. *Unverzagt,* 299 Fed. 1015 (W. D. Wash.), affirmed, 5 F. 2d 492 (C. A. 9), certiorari denied, 269 U. S. 566. (2) Whether or not the treaty between the United States and Peru was in fact in force, the Court throughout its opinion assumed that it was in force. (3) Not only is there no indication in the decision that the Court considered the case as if Ker had been expelled by the duly constituted governing authority, but the Court explicitly stated that "it was a clear case of kidnapping * * * without any pretence of authority under the treaty * * *" (119 U. S. at 443).

[23] Petitioner also tries to distinguish the lower court decisions here cited (Pet., No. 441, p. 24). But these attempted distinctions are likewise baseless since the courts expressly state that the defendant has no standing to challenge a violation of a treaty. Compare the rule that international immunities are for the benefit of the state, rather than the individual, and may be waived without the consent of the individual. See, Brief for the Petitioners, *Wilson, et al.* v. *Girard,* No. 1103, O. T., 1956, pp. 34–37 (authorities cited).

Frisbie v. *Collins*, 342 U. S. 519, 522, this Court reaffirmed the holding of *Ker*, which is dispositive of the merits of the present issue, in the most emphatic terms: "This Court has never departed from the rule announced in *Ker* v. *Illinois* * * * that the power of a court to try a person for crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a 'forcible abduction.' No persuasive reasons are now presented to justify overruling this line of cases."

Neither *United States* v. *Rauscher*, *supra*, nor *Cook* v. *United States*, *supra*, relied upon by petitioner (Pet., No. 441, pp. 10–14), in any way undermines the holding of *Ker* as approved in *Frisbie*. The *Cook* case was a civil suit involving the illegal seizure of a foreign vessel. In the present case, petitioner is an individual and a citizen of this country. The *Cook* case itself carefully distinguished prior cases involving seizures of vessels of American registration (288 U. S. at 122). In addition, the courts have consistently differentiated between civil and criminal cases in which jurisdiction of the defendant has been secured by illegal means. In *In re Johnson*, 167 U. S. 120, 126, this Court stated that "[t]he law will not permit a person to be kidnapped or decoyed within the jurisdiction for the purpose of being compelled to answer to a mere private claim, but in criminal cases the interests of the public override * * *." The *Rauscher* case, which held that a defendant extradited for one offense under an extradition treaty cannot be tried for a different offense, provides the one excep-

tion to the rule that the federal courts do not concern themselves with how the defendant comes before them. But *Ker*, which was decided on the same day as *Rauscher*, both the opinions being written by the same Justice (Miller), distinguishes *Rauscher* on the ground that (119 U. S. at 443) "it is quite a different case when the plaintiff in error comes to this country in the manner in which he was brought here, clothed with no rights which a proceeding under the treaty could have given him * * *."

In summary, apart from the fact that petitioner first waived the contentions which he now seeks to assert, and that they have been previously litigated, it is perfectly plain that the contentions are entirely lacking in merit.

CONCLUSION

For the foregoing reasons, the petitions for writs of certiorari should be denied.

Respectfully submitted.

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